

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. KENNEDY,)	4:06CV3167
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
HEARTLAND COOP,)	
)	
Defendant.)	

This matter is before the court upon Defendant's motion to dismiss the Second Amended Complaint (filing 28). Yesterday, the Magistrate Judge granted a motion by Plaintiff to file a third amended complaint (filing 38). Yesterday's order provided that the pending motion to dismiss would be deemed to address that third amended complaint "unless otherwise ordered." Plaintiff has not yet filed the third amended complaint and yesterday's order did not set a date certain for its filing.

I will consider the motion to dismiss the Second Amended Complaint to relate to the Third Amended Complaint, once it is filed. I will order additional briefing on the motion to dismiss. By ordering additional briefing, I am in no way suggesting that the brief already submitted by Defendant (filing 29) is deficient. That brief was well-written and thorough. Rather, I am requesting briefing on the specific complaint that will be before the court on the motion to dismiss, as the proposed Third Amended Complaint addresses several of the reasons Defendant sought to dismiss this action.

I have reviewed the proposed Third Amended Complaint. Plaintiff should consider whether the proposed Third Amended Complaint should be modified before it is filed to address the following concerns:

- (1) The charge of discrimination attached to the proposed Third Amended Complaint contains some garbled material, suggesting that a

better copy could be filed, and the date of submission of the charge is unclear although knowledge of that date is required to consider whether this action was timely filed;

(2) The right to sue letter attached to the proposed Third Amended Complaint complaint is garbled, suggesting that a better copy could be filed, and the reason why the EEOC closed its file is not clear from the right to sue letter, should that be an issue in this case;

(3) The proposed Third Amended Complaint does not state when the right to sue letter was received, although filing 37-2 indicates that Defendant received it on April 18, 2006, and the date of receipt in part determines whether this action was timely filed;

(4) There are no allegations regarding the number of persons employed by Defendant, and whether or not Defendant is an “employer” as provided by the various state and federal statutes referenced in the complaint depends upon the number of persons employed by Defendant;

(5) The proposed Third Amended Complaint does not state Plaintiff’s age, though it could be calculated from the charge of discrimination attached to it; and

(6) It is unclear whether Plaintiff attempts to state a claim under Neb. Rev. Stat. Ann. § 48-1004, as that section is cited in the jurisdictional allegations but not mentioned in any of the causes of action;

For the foregoing reasons,

IT IS ORDERED:

1. The pending motion to dismiss (filing 28) is deemed to relate to the Third Amended Complaint, whenever it is filed;
2. Plaintiff shall file the Third Amended Complaint, with any modifications he deems prudent in response to the observations in this order, on or before February 7, 2007. In the event of noncompliance with this order, and without further notice, this action will be dismissed with prejudice;
3. If a Third Amended Complaint is timely filed,
 - a. Defendant shall submit a brief supporting its motion to dismiss that complaint on or before February 19, 2007;
 - b. Plaintiff shall submit a brief in response on or before March 1, 2007; and
 - c. Defendant shall either submit a reply brief or a statement indicating it will not file a reply brief on or before March 12, 2007.

January 31, 2007

BY THE COURT:

s/Richard G. Kopf
United States District Judge